IN THE

Supreme Court of the United States

OCTOBER TERM—1926.

THE UNITED STATES,
Petitioner,

v.

STONE & DOWNER CO., and LOWE DONALD & CO.,
Respondents.

No. 150.

On Writ of Certiorari to the United States Court of Customs Appeals.

MOTION TO DISMISS OR AFFIRM.

Now come the above named respondents, by their counsel appearing in their behalf, and move this Honorable Court to dismiss the Writ of Certiorari heretofore granted by this Court on October 12, 1925 (United States *v.* Stone & Downer *et al.*, 269 U. S., 542), or in the alternative to affirm the judgment below.

The Facts.

1. On August 2, 1926, after the Writ of Certiorari was granted, there was filed with this Court and copies thereof printed in the record (R. 108-126), certified copies of the opinion and final judgment of the Court of Customs Appeals in a prior suit involving exactly similar importations, which has never been reversed nor modified wherein every question raised by the present suit was adjudicated between the present parties. The said prior decision is reported in Stone & Downer *v.* United States, 12 Ct. Cust. Appls., 62. Suit 2245.

2. The record in the earlier suit (No. 2245) was part of the present record in the Courts below and their decisions in the present case were based upon the decision of the Court of Customs Appeals in the prior suit.

3. No effort was made to obtain a review of the decision of the Court of Customs Appeals in the prior case and the time has expired within which a review could be sought.

The Grounds for the Motion Are:

1. The Writ of Certiorari should be dismissed because the present respondents obtained a final judgment in their favor which has never been reversed nor modified, against the present petitioner in a prior suit, in which the present question was distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery and cannot be disputed in this second suit between the same parties.

2. The judgment of the Court of Customs Appeals should be affirmed because its correctness is conclusively established by its prior decision upon the same question and further argument is needless and could serve no purpuse other than delay.

EDWARD P. SHARRETTS,
Attorney for Respondents.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

Judgments and Opinions Below.

The judgment of the Court of Customs Appeals in the present suit is printed in the record (R. 407), the opinion is printed (R. 402) and is reported in United States *v.* Stone & Downer Co., 12 Ct. Cust. Appls., 557. The judgment of the Board of General Appraisers affirmed thereby is printed (R. 401). The opinions of the Board are printed (R. 397-400) and reported in Treasury Decision 40368.

The Judgment of the Court of Customs Appeals in the prior suit (No. 2245) which is claimed here to be *res judicata* is printed (R. 426). The opinion is printed (R. 409) and reported in Stone & Downer Co. *v.* United States, 12 Ct. Cust. Appls., 62.

Authority and Precedents for the Motion.

The present motion is made under Rule 6, paragraphs 4 and 5 of the Revised Rules of this Court.

Relative to petitions for certiorari, this Court, speaking through Mr. Justice McReynolds, has said: *"Petitions of this character are at the risk of the party making them, and whenever in the progress of the cause facts develop which, if disclosed on the application would have induced a refusal, the Court may upon motion by a party or ex Mero Motu dismiss the writ."* *Furness, Withy & Co.* v. *Yang-Tsze*, 242 U. S., 430, 431. *"Obviously it is impossible for us critically to examine so many records before ruling upon applications and we must rely very largely upon preliminary papers. Unless the requirements specified in Furness, Withy & Co.* v. *Yang-Tsze Insurance Ausocia-*

tion are observed we cannot hope properly to dispose of an increasing docket." Southern Power Co. v. *Pub. Serv. Co.*, 263 U. S. 508, 509. See also *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393, and *United States* v. *Rimer*, 220 U. S. 547.

Statement.

The present suit, which in the Court below was Suit No. 2463 and in this Court No. 150, had its origin in protests filed by the respondents against the action of the Collector of Customs at the port of Boston in classifying certain importations of wool, yarn and cloth in paragraphs 18 and 19 of the Emergency Tariff Act of May 27, 1921 (42 Stat. 9, 10).

The protests were filed and later reviewed by the Board of United States General Appraisers and the United States Court of Customs Appeals under the procedure provided in Paragraph N, Section III of the Tariff Act of October 3, 1913 (38 Stat. 114, 187).

The decision below of the Court of Customs Appeals affirmed a judgment of the Board of General Appraisers which sustained the claims in the protests. The Writ of Certiorari from this Court, the dismissal of which is here prayed for, was sought and allowed under Section 195 of the Judicial Code, as amended August 22nd, 1914, c. 267, 38 Stat. 703, a certificate of importance having been filed by the Attorney General prior to the decision of the Court of Customs Appeals. The respondents filed a brief in opposition to the granting of the writ.

The wool, yarn and cloth was imported and entered at the port of Boston at various dates during the years 1921 and 1922, when the Tariff Act of October 3, 1913 (38 Stat. 114) and the Emergency Tariff Act of 1921 were in effect.

Paragraph 650 of the Act of 1913 (38 Stat. 114, 164) placed on the free list all *"wool of the sheep."* Paragraph 18 of the Emergency Act modified paragraph 650 of the 1913 Act by directing an assessment of duty upon one class of sheeps wool, to wit: *"wool, commonly known as clothing wool,"* leaving all other classes of sheeps wool free under paragraph 650 of the 1913 Act. Paragraph 19 of the Emergency Act required certain emergency duties, in addition to those required by the Act of 1913, on *"manufactures of which wool or hair of the kind provided for in paragraph 18 is the component material of chief value."*

The protestants claimed that the wool imported by them was not "wool, commonly known as clothing wool" and therefore not subject to the duty provided in paragraph 18 of the Emergency Act, but was free of duty under paragraph 650 of the Act of 1913; that the yarn and cloth were not composed in chief value of "wool, commonly known as clothing wool" and therefore not subject to the additional duty provided in paragraph 19 of the Emergency Act.

The issue presents two controlling questions: 1st: *Is the wool at bar as represented by Exhibits 1 to 12 "wool, commonly known as clothing wool?* 2nd: *Are the yarns and cloth as represented by Exhibits 14 and 15, manufactures of "wool, commonly known as clothing wool?"*

Exhibits 1 to 12 consist of 12 samples of wool marked Exhibits 1 to 12. Exhibit 14 is a sample of yarn. Exhibit 15 is a sample of cloth. The same exhibits had been used in a prior suit (No. 2215) involving precisely similar importations of wool, yarn and cloth in which the United States and the present respondents were parties and in which suit the Court of Customs Appeals had rendered a final judgment in favor of the present respondents (in

that case the appellants) on the same questions that are raised in the present suit. Stone & Downer *v.* United States, 12 Ct. Cust. Appls. 62, Suit 2215. That judgment has never been reversed nor modified. The said Exhibits and the record in the prior suit (No. 2215) were introduced into the present suit by agreement made in open court when the present suit was before the Board of General Appraisers (R. 20).

Respondents rested upon the agreement and record so made (R. 20).

The Government introduced the testimony of five witnesses who had not testified in the prior suit (R. 21-77). The respondents introduced one witness in rebuttal (R. 77).

Upon the record so made the Board of General Appraisers sustained the protests on the authority of the decision of the Court of Customs Appeals in the prior suit (No. 2215). (R. 397-401). The Government appealed to the Court of Customs Appeals where the judgment of the Board was affirmed on the authority of the prior decision of that Court in Suit 2215 (R. 402-407).

The transcript of record filed with this Court at the time the petition for certiorari was made contained the testimony of the nineteen witnesses who had been examined in the prior suit (2215) and the judgment of the Board of General Appraisers in that suit, which was adverse to the protestants. It did not, however, contain the final judgment of the Court of Customs Appeals in that suit which reversed the decision of the Board of General Appraisers and affirmed the protestants' contention as to all the merchandise excepting that represented by Exhibit No. 13.

On August 2, 1926, certified copies of the final judgment and Opinion of the Court of Customs Appeals in Suit 2245 were filed with this Court under an agreement of counsel. Copies of the agreement, judgment and Opinion are now printed in the present record (R. 408-426).

The respondents in the present motion to dismiss the Writ of Certiorari contend that the final judgment in Suit 2245 adjudicated the questions now raised by the present suit and is conclusive as to those questions between the present parties.

The relationship between the present suit and the prior Suit 2245 appears throughout the record and in the opinions, briefs and arguments in the Courts below.

Suit 2245 was made up as a test case to try out the present issue and involved seven protests selected for that purpose (R. 114). A comprehensive record was made. Nineteen witnesses were examined as to whether the wool as represented by the exhibits was or was not known as "clothing wool." Eleven of these witnesses were called by the Government (R. 117-365). Upon the record so made the Board of General Appraisers, one member dissenting, overruled the protests and entered judgment in favor of the Government (R. 365-397). The protestants appealed to the Court of Customs Appeals (R. 91). Under Section 195 of the Judicial Code, as amended, it was the right of the Attorney General to file a certificate, prior to the decision of the Court of Customs Appeals, to the effect that the case was of such importance as to render expedient its review by the Supreme Court, and thus make it possible for either party, after the decision of the Court of Customs Appeals, to apply to this Court for a Writ of Certiorari. The Attorney General elected not to file the certificate of importance. The Court of Customs Appeals in

a unanimous decision of its five judges, reversed the decision of the Board as to all the merchandise excepting that represented by Exhibit 13. See final judgment (R. 426).

The Government asked for a rehearing but its petition was denied. Stone & Downer *v.* United States, 12 Ct. Cust. Appls. 78.

The final judgment of the Court of Customs Appeals in Suit 2245 has never been reversed nor modified.

While Suit 2245 was pending in the Court, many protests, raising the same questions, reached the Board of General Appraisers and were placed upon the suspended file of the Board to await the final disposition of Suit 2245.

On May 28, 1924, more than three months after the Court of Customs Appeals had entered its final judgment in Suit 2245, the five protests which make up the present suit were taken from the suspended files and called for trial before the Board of General Appraisers (R. 20). As already shown, the protestants introduced the record and exhibits in suit 2245 and the agreement relative thereto and rested (R. 20). The subsequent proceedings culminating in the Writ of Certiorari from this Court have already been set forth above.

The following extracts from the opinion and final judgment of the Court of Customs Appeals in Suit 2245 indicate the questions presented and decisions thereon.

In the opinion Judge Bland speaking for the Court of Customs Appeals in Suit 2245 said (R. 409, 425) (*Stone & Downer Co.* v. *United States,* 12 Ct. Cust. Appls. 62, 63, 77, 78):

"The merchandise covered by this appeal consists of wool, worsted yarn, and worsted cloth. The wool was assessed for duty under paragraph 18 of the Emergency Tariff Act of 1921, reading 'wool commonly known as clothing wool.' Appellant claim that the wool in question is combing wool, and that the yarn and cloth are made from combing wool. The yarns and cloth were assessed for duty under paragraphs 287 and 288 of the Act of 1913, and in addition 45 cents per pound under paragraph 19 of the Emergency Act. It is the contention of the importers that combing wool is not included in paragraph 18, and that their importation falls under the free list of the Act of 1913, paragraph 650."

* * * * * * *

"We hold that when Congress used the phrase 'commonly known as clothing wool' it knew that there was a definite kind of wool known to its citizens who were familiar with the question as 'clothing wool' and that it must be declared to have intended the ordinary and usual meaning of its words. Clothing wool does not embrace combing wool. Combing wool, and products made therefrom, are the goods in controversy. Combing wool, on date of the entry, was on the free list of the Act of 1913. The protests should have been sustained. The judgment of the Board of General Appraisers is reversed."

The Court of Customs Appeals in its final judgment in Suit 2215 held (R. 126):

"* * * The judgment of the Board of United States General Appraisers, in so far as it relates to the merchandise represented by exhibit numbered 13, be, and the same is hereby affirmed; and that as to all other merchandise covered by said appeal

said judgment be and the same is hereby, reversed, and said merchandise is held not to be dutiable under the Emergency Tariff Act of 1921, but to be free of duty or dutiable at the appropriate rates of the tariff act of 1913; and said appeal is remanded to said Board for proper action in the premises."

The following extracts from the opinion and judgment of the Courts below in the present suit indicate the questions here presented.

From the opinion of the Court of Customs Appeals (R. 402, 407) (*United States* v. *Stone & Downer Co.*, 12 Ct. Cust. Appls. 557, 558, 563):

"At the trial below it was stipulated that the wool covered by protests 945882/11410, 945938/11385, and 956790/11920 is in every essential and material respect the same as Exhibits 1 to 12, inclusive, in Suit No. 2245, decided by the United States Court of Customs Appeals in Stone & Downer Co. *et al. v.* United States (12 Ct. Cust. Appls.—; T. T. 40019), dated November 17, 1923 (45 Treas. Dec. 167), and that the yarn covered by protest 950777/11585 consists of worsted yarn and is in every essential and material respect the same as Exhibit 15 in said Suit No. 2245.

It was further stipulated that the cloth covered by protest 949137/11507 consists of worsted cloth made from worsted yarn and is in every essential and material respect the same as Exhibit 14 in said suit No. 2245.

It was also stipulated that the record in said suit No. 2245, including the exhibits, shall be made a part of the record in this case.

Exactly the same questions are here involved as were before the court in the Stone & Downer case, *supra*. Some new evidence was introduced by both

> sides with reference to the meaning of 'clothing wool.' The new evidence throws no new light on the case, except that a reading of it confirms us in the opinion that wherever and whenever clothing wool is spoken of by anyone knowing the meaning of the term it means a short-stapled wool used in the carding process as distinguished from combing wool, which is used in the combing or worsted process."
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> "The opinion in Stone & Downer case, *supra,* is sufficiently replete with authorities on all questions raised to obviate repetition here. The judgment of the Board of General Appraisers is affirmed."

From the judgment of the Court of Customs Appeals in the present case (R. 407):

> "Ordered that the judgment of the Board of United States General Appraisers be, and the same is hereby, affirmed."

From the Judgment of the Board (R. 401):

> "It is hereby ordered, adjudged, and decreed this 9th day of September 1924, that the protests in this case, claiming certain combing wool in protests 945882, 945938 and 956790 to be free of duty under paragraph 650, Act of 1913, and certain yarn in protest 950777, to be dutiable at only 18 per cent ad valorem under paragraph 287, act of 1913, and certain wool cloth in protest 949137 to be dutiable at only 35 per cent under paragraph 290 of said act, are sustained, and the collector of customs at the port of Boston will reliquidate the entries accordingly."

Three short opinions were written by the three members of the Board pointing out that the questions presented in the present suit were the same as those decided by the Court of Customs Appeals in the earlier case (R. 397-400).

ARGUMENT.

I.

The Writ of Certiorari should be dismissed because the present respondents obtained a final judgment in their favor which has never been reversed nor modified, against the present petitioner, in a prior suit, in which the present question was distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery and cannot be disputed in this second suit between the same parties.

1. *The parties to the present suit were parties in Suit 2245 decided in Stone & Downer Co.* v. *United States,* 12 Ct. Cust. Appls. 62.

The final judgment of the Court of Customs Appeals in Suit 2245 (R. 426) names the following parties as appellants: Stone & Downer Co., John R. Conkey, J. A. Karnheim and Lowe, Donald & Co.—The United States is named as appellee.

The final judgment of the Court of Customs Appeals in the present suit (R. 401, 407) names the United States as appellant and the following as appellees: Stone & Downer Co. and Lowe, Donald & Co.

The repetition of the same names in the two judgments, in itself, there being no evidence to the contrary, is presumptive proof that the parties are the same—*Fowler* v. *Stebbins,* 136 Fed. 365, 366. The official reports of the Collector of Customs in the record show that Stone & Downer Co. was the importer in the case of three importations of wool and one importation of yarn in Suit 2245 (R. 95-105), and the importer of the importations of wool and yarn in the present suit (R. 7-16); that Lowe,

Donald & Co. were the importers of one importation of cloth in Suit 2215 (R. 113, 114), and the importers of the cloth in the present suit (R. 18, 19).

Paragraph B. Section 3, Tariff Act 1913 (38 Stat. 181) which is a re-enactment of similar provisions of virtually all prior tariff acts, provides: *"That all merchandise imported into the United States shall, for the purpose of this Act, be deemed and held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof*: * * *." The present respondents were the consignees as thus defined and were personally liable to the United States for the duties. *Meredith* v. *United States*, 13 Pet. 486, 493; *United States* v. *Vandiver*, 133 Fed. 252; *Baldwin* v. *United States*, 113 Fed. 217; *United States* v. *Bishop*, 125 Fed. 181. They were, therefore, so far as the protested duties were concerned, the direct parties in interest.

2. *The importations covered by the present suit are of exactly the same character as those covered by the prior suit.*

When the present suit was before the trial court (Board of General Appraisers) it was conceded that the merchandise in both suits was exactly alike and it was agreed that the same set of exhibits used to represent the merchandise in suit 2245 should be accepted as representing the present importations. Counsel for the Government said relative to that agreement (R. 20):

> Mr. Lawrence: That is agreed to, we having submitted the invoices to the appraiser at Boston, who confirms the identity of the merchandise under protest with that in suit 2245.

3. *The point in question presented for determination in the present suit is the same as that litigated and determined in suit 2245.*

The only provision of the Emergency Act under which the wool at bar could be assessed for duty, was contained in the six words of Paragraph 18, to wit: *"wool, commonly known as clothing wool."* Recovery in both suits, therefore, depends upon the adjudication of the same question—is the wool represented by Exhibits 1 to 12, "wool, commonly known as clothing wool"? In the case of the cloth and yarn represented in both suits by Exhibits 14 and 15 they are made from wool of the same character as that shown by Exhibits 1 to 12 and the petitioner frankly admits in his petition for certiorari (page 9), that their classification in paragraph 19 of the Emergency Act automatically depends upon the adjudication of the same question.

The assignment of errors dealing with the vital question at issue in the Government's appeal from the Board of General Appraisers in the present suit—assigned errors 3 to 12—(R. 1, 2), are the exact converse of the errors relative to the same question in the prior suit (2245) in which the present respondents were appellants—assigned errors 3 to 12—(R. 92).

In the opinion below, in the present suit, Judge BLAND, speaking for the Court of Customs Appeals, after referring to the earlier case said (R. 402): *"Exactly the same questions are here involved as were before the court in the Stone & Downer case, supra."*

The Government did not dispute that finding in its petition for the writ of certiorari. On the contrary at page 7 of the petition, the petitioner in referring to the earlier case, said: *"As a preliminary statement it may*

well be pointed out that the dutiable status of similar importations of wool was originally presented to the Court of Customs Appeals in the case of Stone & Downer Co. et al. v. *United States,* 12 Ct. Cust. Appls. , T. D. 40019, 45 Treas. Dec. 167." And at page 8 of the petition in referring to the earlier case, says: *"That case, like the instant one, was instituted by protests which were filed against the decisions of the collector of customs at Boston in classifying importations similar to those in the case at bar under the provisions of paragraphs 18 and 19 of the Emergency Tariff Act."*

Nowhere, in his petition or elsewhere, has the petitioner contended that the present suit involves a different question than that decided by the Court of Customs Appeals in the prior suit. The clear purpose of the Government in appealing the present case from the Board of General Appraisers was not to raise a new issue, but rather, to create the opportunity to file a certificate of importance prior to the decision of the Court of Customs Appeals, and, if possible, obtain in this Court a review of the precise issue finally decided by the Court of Customs Appeals in the earlier suit. A petition for certiorari was not made in the earlier suit because the Attorney General had not filed a certificate of importance, prior to the decision of the Court of Customs Appeals, as required by Section 195, of the Judicial Code, as amended. It is well settled in this Court, however, that the existence or non-existence of a right, in either party, to have the judgment in a prior suit re-examined by a higher court, cannot, in any case, control the inquiry as to the conclusiveness of the judgment in the prior suit between the same parties. *Johnson Co.* v. *Wharton,* 152 U. S. 252, 261.

4. The additional testimony introduced in the present suit did not raise any new question, nor does it change the facts.

In its petition for the writ of certiorari the Government at page 8 of the petition in effect admits that the additional testimony in the present suit is merely cumulative. Thus petitioner says:

> "* * * while the record in the former case was incorporated and made part of the record herein, a great deal of additional testimony was introduced in the present case to substantiate that introduced by the Government in the former case, as already pointed out."

In the opinion below of the Court of Customs Appeals, Judge BLAND speaking for the Court said with reference to the additional testimony (R. 402):

> "The new evidence throws no new light on the case, except that a reading of it confirms us in the opinion that wherever and whenever clothing wool is spoken of by anyone knowing the meaning of the term it means a short-stapled wool used in the carding process as distinguished from combing wool, which is used in the combing or worsted process."

General Appraiser Sullivan in the opinion of the Board of General Appraisers below says with reference to the additional testimony (R. 399):

> "Sullivan, General Appraiser: in the foregoing cause considerable testimony was introduced in addition to that contained in the original case, Stone & Downer Co. *et al. v.* United States, G. A. 8613 (T. D. 39473, 43 Treas. Dec. 141).
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> "The additional testimony, in my judgment, does not change the facts."

5. *The final unmodified judgment of the United States Court of Customs Appeals in a prior suit between the present parties having adjudicated the questions presented in the suit brought to this Court by the present writ, there is no question on the merits left open for argument in this Court and the Writ should be dismissed.*

The present suit is a second action brought by the same importers to recover customs duties paid under the same law on the same class of articles. Where different actions are brought by the same plaintiff to recover taxes paid under protest under the same law on the same class of articles, a judgment in one case is conclusive in the others as to all such matters as were actually and necessarily litigated and decided therein and thereby. *Johnson & Johnson* v. *Herold*, 161 Fed. 593, 601, 602. Affirmed by the Circuit Court of Appeals, Third Circuit, and the above rule approved in *Rutan* v. *Johnson & Johnson* and *Herold* v. *Same*, 231 Fed. 369, 375.

The Johnson & Johnson litigation is very similar to the present. Successive protests against Internal Revenue stamp taxes, imposed at different periods upon like classes of articles, manufactured by the plaintiffs, were made the subject of 18 different suits. The controversy called in question the Treasury Department's construction of the language of Sec. 20 and Schedule B. of the War Revenue Act of June 13, 1898 (30 Stat. 456, 462, c. 448).

Two of the suits were decided in favor of the plaintiffs in the United States Circuit Court by Judge Archbald, one of which was against Rutan, Collector (*Johnson & Johnson* v. *Rutan*, 122 Fed. 993), the other against Herold, Collector (*Johnson & Johnson* v. *Herold*, 123 Fed. 409). Writs

of error were sued out upon the judgments, but were dismissed by the Circuit Court of Appeals because not filed in time (130 Fed. 109).

The remaining 16 suits were brought at the same time in the Circuit Court before Judge Cross. The opinion is reported in *Johnson & Johnson* v. *Herold*, 161 Fed. 593, *supra*. In holding that the questions decided in the two earlier suits were *res judicata*, Judge Cross says at page 602 of the opinion: *"The stamps were all imposed under the same act, upon like classes of articles between the same parties and during successive periods of time."*

Judge Cross' decision was later reviewed and affirmed by the Circuit Court of Appeals in *Rutan* v. *Johnson*, 231 Fed. 369, *supra*. Judge McPherson, speaking for the Circuit Court of Appeals, said at page 375 of the opinion: *"It is unnecessary to cite authorities for the proposition that the judgments in the two cases before Judge Archbald operated by way of estoppel to prevent the government from reexamining in the present suits the same or, essentially the same, questions that he had previously decided."*

The principles of *res judicata* applied by the Circuit Court and Circuit Court of Appeals in the Johnson & Johnson cases, *supra*, are well settled in this Court. *"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit re-*

mains unmodified." *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 513, 514; *Cromwell* v. *County of Sac.*, 94 U. S. 351, 353.

In the prior suit, between the present parties (*Stone & Downer Co., et al.* v. *United States*, 12 Ct. Cust. Appls. 62, Suit 2245) it was decided that wool represented by Exhibits 1 to 12 was "combing wool" and not "wool, commonly known as clothing wool," as provided for in paragraph 18 of the Emergency Tariff Act of 1921; that yarn and cloth represented by Exhibits 14 and 15 are manufactures of combing wool and not the manufactures described in paragraph 19 of the same act. Final judgment was entered (R. 126), which has never been reversed nor modified. The decisions upon those questions are not merely enunciations of rules of law. The questions are not unmixed questions of law. They constitute facts, questions or rights distinctly adjudged and cannot be disputed in a subsequent action between the same parties, even if the determination of the questions was reached upon an erroneous view or by an erroneous application of the law. *United States* v. *Moser*, 266 U. S. 236, 242.

In United States *v.* Moser, *supra*, the question, the adjudication of which in an earlier case was held to be *res judicata*, was whether services at the Naval Academy constitutes "service during the Civil War" within the meaning of the provision of paragraph 11 of the Navy Personnel Act of March 3, 1899, c. 413, 30 Stat. 1004, 1007 as follows: "That any officer of the Navy with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade". This Court decided that this was not an unmixed question of law and that an adjudication on

this question by the Court of Claims was conclusive in future actions between the same parties upon different demands.

In the present suit the wool, yarn and cloth are conceded to be in every essential and material respect the same as the exhibits passed upon in the prior suit (No. 2245), and the same exhibits were introduced into the present suit by agreement as representative of the wool, yarn and cloth (R. 20). The controversy here, as was true in the prior suit, turns upon whether the wool represented by Exhibits 1 to 12, is "Wool, commonly known as Clothing Wool" and whether the yarns and cloth represented by Exhibits 14 and 15 are manufactures of such wool. The decision on those questions in the earlier suit between the present parties must be accepted in this second suit as irrefragable truth. *Washington, Alexandria & Georgetown Steam, Packet* v. *Sickles*, 24 How. 333, 343.

The additional testimony introduced in the present suit (R. 21-91) is simply cumulative.

However strong the new evidence might be in support of the Government's contention, it would be contrary to the well settled rule of *res judicata*, to go behind the former adjudication, and deny to the respondents the benefit of the rule making that adjudication, so long as it was unmodified, conclusive, as between the parties to it, of all matters actually determined under the issues in the prior suit. *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 62, 65; *Smith* v. *Town of Ontario*, 4 Fed. 386, 391.

In *United States* v. *Southern Pacific Railroad Co.*, 146 U. S. 570, the Government had sued to cancel the patents issued to the Southern Pacific Railroad and annul its title to certain lands at the intersection of the Southern Pacific and Atlantic & Pacific Railroads.

The Government claimed that title to the land remained in the Atlantic & Pacific Railroad until it was forfeited to the Government by act of Congress and that the Southern Pacific Railroad never acquired title to the land in dispute.

The controversy turned upon the validity of certain maps of location which had been filed in the land office by the Atlantic & Pacific Railroad, and which included the land in question. It was held that the maps were valid and the case went against the railroad. The United States later brought suit against the Southern Pacific Railroad in the United States Circuit Court to quiet its title to other lands specified on the same maps and introduced in evidence the record in the prior case. The railroad introduced considerable new evidence in the later case tending to show that the maps were but fraudulent pretenses and did not show the forfeited lands. Judge Rose in the Circuit Court said, "In my opinion, the evidence in the present case shows that to be true." (*United States* v. *Southern Pacific Railroad Company*, 62 Fed. 531, 534), but followed the decision of this court in the earlier case. This judgment was affirmed by the Circuit Court of Appeals in *Southern Pacific Railroad Company* v. *United States*, 69 Fed. 47. The question of *res judicata* was not considered in the lower courts. The case was appealed to this Court and decided in *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, *supra*. The railroad claimed that the introduction of new evidence in the case eliminated the question of *res judicata* and further that the new evidence raised questions not decided in the former case as to the validity of the maps of location (168 U. S. 12, 13). As to this point Mr. Justice Harlan speaking for this Court, said at page 65 of the

opinion: *"Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of res judicata. Without, therefore, expressing any opinion as to the effect of this new evidence relative to matters once finally adjudged, we hold that the Southern Pacific Railroad Company cannot, in this proceeding, question the validity of those maps as maps of definite location."*

It having been conceded that the wool, yarn and cloth in the present suit are in every essential and material respect the same as the wool, yarn and cloth in the prior suit (R. 20), the fact that the two suits cover different importations does not impair the conclusiveness of the prior decision upon the questions common to both suits.

In *Johnson & Johnson* v. *Herold, supra,* the different actions did not involve the same identical articles. They involved the same class of articles. In *Southern Pacific R. R. Co.* v. *United States, supra,* the lands covered by the two suits were different although equally affected by the questions at issue. A judgment of the United States Circuit Court holding that certain guard rails were covered by a patent, known as the Wharton patent, was held to be conclusive in a subsequent action between the same parties involving *similar* rails. *Johnson Co.* v. *Wharton,* 152 U. S. 252, *supra.* A judgment holding property exempt from taxation concludes the State in suits brought for taxes of other years under the same law. *New Orleans*

v. *Citizen's Bank*, 167 U. S. 371, 396, 398; *Baldwin* v. *Maryland*, 179 U. S. 220, 222; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 513; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 291. In holding a judgment in favor of a bondholder upon certain municipal bonds to be conclusive in a second suit on other bonds of the same issue, this Court, speaking through Mr. Justice SWAYNE said: *"The court had full jurisdiction over the parties and the subject. Under such circumstances a judgment is conclusive not only as to the res of that case, but as to all further litigation between the same parties touching the same subject matter, though the res itself may be different."* *Beloit* v. *Morgan*, 7 Wall. 619, 622. See also *Aurora* v. *West*, 7 Wall. 82, 96, and *Washington, Alexandria and Georgetown Steam Packet* v. *Sickles*, 24 How. 333, 342. In the later case of *Cromwell* v. *County of Sac*, *supra*, it was held that where the second suit is upon a different claim or demand, the doctrine stated in *Beloit* v. *Morgan* and *Aurora* v. *West*, *supra*, applies only to the right, question or fact distinctly put in issue and directly determined in the prior suit, as a ground of recovery. To that extent the doctrine has been consistently followed and will be found to run through nearly all the American cases. *Black on Judgments*, 2nd Edition, §506. The application of the rule, in so far as the *res* is concerned, is well illustrated in a patent case decided by the United States Circuit Court of Appeals, First Circuit, where it was held that where a second action growing out of an interference proceeding involves the same identical articles covered by a former judgment there is a complete bar to the commencement of a second action and where the articles in the second action are not the same articles there is no bar to the commencement of the second action, but under

the doctrine stated in *Cromwell* v. *County of Sac, supra,* every question decided in the first case is *res judicata* if it arises again in the second action between the same parties. *Sutton* v. *Wentworth,* 247 Fed. 493, 501, 502.

In the petition for certiorari the petitioner (page 5) specifies five errors which he alleges were made by the Court below. The first assigned error is to the effect that the Court erred in holding that the wool at bar is not "wool, commonly known as clothing wool." In the other four assignments petitioner alleges that the Court below disregarded decisions of this Court in declining to review the history of the times when the Emergency Act was passed; that it disregarded rules of construction; that it improperly applied testimony and that it did not give due force to testimony introduced by the Government. On page 6 of the petition the petitioner calls attention to the number of suits awaiting the outcome of this one and the estimated amount involved and asks this Court to review the case because of its importance in disposing of the suits pending.

Obviously this Court could not give the petitioner the relief sought in the instant case without holding that the wool represented by Exhibits 1 to 12 is in fact "wool, commonly known as clothing wool." But the prior judgment in Suit 2245 is conclusive to the contrary and every defence requiring the negation of what was there decided is met and overthrown by that adjudication. *Lumber Co.* v. *Buchtel,* 101 U. S. 638, 639. With that question decided all other propositions raised by the petitioner become merely moot questions. It could not help the petitioner in the instant case to show that the determination which is *res judicata* was reached upon an erroneous view or by an erroneous application of the law. *United*

States v. *Moser*, *supra*, page 242. Even if it could be shown to be wrong, not having been reversed, it is *res judicata*. *North Carolina Railroad Co.* v. *Story*, 268 U. S. 288, 292. It may be as claimed by petitioner that the various questions of statutory construction, weight of evidence, etc., referred to in the petition are of importance in disposing of the pending suits. *"But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." California* v. *San Pablo, etc., R. Co.*, 149 U. S. 308, 314.

II.

The judgment of the Court of Customs Appeals should be affirmed because its correctness is conclusively established by its prior decision upon the same question and further argument is needless and could serve no purpose other than delay.

Conclusion.

For the reasons herein given it is respectfully submitted that the writ of certiorari should be dismissed or in the alternative the judgment below should be affirmed.

Respectfully submitted,

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